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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

FRANK A. JASKIEWICZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court on the pre-trial Motion to Suppress Evidence (App. 1b-24b) is reported in 278 F. Supp. 525. The opinion of the District Court on the Motion for Judgment of Acquittal under Rule 29(c) (App. 25b-35b) is not reported.

The opinion of the Court of Appeals (App. 36b-46b) is reported in — F. 2d — (decided 9/28/70).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 28, 1970 (App. 47b). The jurisdiction of this Court rests on Section 1254 of the Judicial Code.

QUESTIONS PRESENTED.

I. Where the Internal Revenue Service used the guise of a routine civil tax examination solely to obtain evidence for its contemplated criminal prosecution, whether the use of the evidence so obtained at the criminal trial of Petitioner for tax evasion was violative of his Fourth, Fifth and Sixth Amendment rights or a departure from the proper standards of the administration of justice.

II. Whether the *Miranda* warnings were required when the Petitioner's tax investigation case was formally referred to the Intelligence Division and a special agent assigned.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment IV.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated. . . .

• • •

Amendment V.

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

• • •

Amendment VI.

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE.

This case involves the use of evidence at Petitioner's criminal trial in the District Court for income tax evasion in violation of Section 7201 of the Internal Revenue Code, 26 U. S. C. Sec. 7201, claimed to have been unconstitutionally obtained from the Petitioner in violation of his search and seizure, self-incrimination, due process and counsel rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, or as a departure from the proper standards of the administration of justice.

The facts material to the questions presented are substantially as follows:

Contemplated Criminal Prosecution Under Guise of Routine Tax Examination.

On or about December 3, 1962, the Internal Revenue Service assigned one Constantine A. Daniels to an investigation of the income tax liabilities of the Petitioner for the years 1957, 1958 and 1959 (App. 11b, 37b, 32a).[1] Mr. Daniels was designated a revenue agent of the Audit Division (App. 37b). However, he was an agent assigned to the fraud group (197a-198a) and in September or November, 1962, prior to the referral to him of Petitioner's case for examination, he, together with some other members of the fraud group, had his office transferred from its usual location in the Audit Division quarters to a physical location with the Intelligence Division, the criminal arm of the Internal Revenue Service (App. 45b, 198a-200a).[2]

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1. Record references are to the separate Appendix to the Briefs in the Court below.

2. The statement by the Court below that his office was located "in close proximity to the offices of the Intelligence Division" appears to be somewhat misleading.

Moreover, the tax returns of the Petitioner were assigned to Mr. Daniels as part of the organized crime drive (App. 37b, 45b, 242a). In addition, almost two years before these events, beginning on February 18, 1961, and continuing until March 12, 1963, the Post Office Department had, at the request of the Intelligence Division, established a mail cover on the Petitioner (App. 37b, 45b).[3]

From March 26, 1963 when Mr. Daniels first interviewed the Petitioner, identifying himself as an Internal Revenue agent to as late as April 14, 1964 when he officially referred Petitioner's returns to the Intelligence Division for investigation, Mr. Daniels held numerous conferences with Petitioner and his accountant. At no time did Mr. Daniels give to Petitioner or to his accountant any warnings with respect to Petitioner's alleged constitutional rights to remain silent, not to incriminate himself or to representation by counsel or indicate that the nature of the examination was in any way a criminal one (App. 11b, 38b).

In this connection, the Court below observed that Agent Daniels testified his initial investigation was routinely civil, that his duties were entirely civil and that the location of his office was a mere housekeeping matter for the Internal Revenue Service (App. 46b), apparently to attempt to support the finding of the District Court in both its pre and post trial opinions that until the formal reference of Petitioner's case to the Intelligence Division on April 14, 1964, the inquiry concerning Petitioner's tax liability represented no more than a routine civil investigation (App. 15b, 17b, 27b), and its own finding that the assignment to the Revenue Agent was accompanied by no special instructions and was made routinely through the usual audit channels (App. 37b).

3. The Court below merely recognized the existence of the mail cover but for some reason did not indicate that it was "furnished in compliance with your [Intelligence Division] request" (50a-51a).

Full Miranda Warnings.

The Intelligence Division assigned Petitioner's file to Special Agent Maser after it received the referral from Mr. Daniels on April 14, 1964. On June 9, 1964,[4] Mr. Maser called on Petitioner's accountant who had prepared and signed a number of tax returns, identified himself as a special agent and advised that he was there to determine whether there was a fraudulent understatement of income (App. 38b).

The accountant arranged for a meeting between Messrs. Maser and Daniels and Petitioner at Petitioner's office on June 11, 1964. Fifteen more interviews were then held between the two agents and the Petitioner until August 5, 1965. All meetings between Petitioner and the Revenue and Special Agents took place during normal working hours, at Petitioner's own telephone equipped office, with other friendly persons, including Petitioner's son-in-law, on the premises on each occasion. Neither agent carried firearms or handcuffs during the interviews and the Court below observed that the Special Agent testified that questions were put to Petitioner in a gentlemanly and conversational tone more moderate than that of defense counsel in his cross-examination (App. 38b-39b, 358a-368a, 481a-515a).

The only warnings ever given to Petitioner were given to him at the first contact on June 11, 1964. Present were the Revenue and Special Agents and the Petitioner, but no one, counsel or accountant, was in attendance on behalf of Petitioner (App. 38b, 417a-418a). At the outset (App. 38b, 13a-15a):

> "Special Agent Maser advised Mr. Jaskiewicz that under the Constitution, he was not required to make any statements or furnish any information which might incriminate him for violation of any Federal law. He

4. Incorrectly referred to by the Court below as August 13, 1964.

said that he understands these rights and has nothing to hide. He declined to be sworn."

Neither on June 11, 1964 nor at any time thereafter, did either agent advise Petitioner of his right to have counsel present (App. 39b) or that the investigation had changed to one with a view toward criminal prosecution (App. 12b, 27b).[5] However, the Court below found that on June 11, 1964 and at all times pertinent to the investigation, Petitioner was represented by retained attorneys. At a meeting on January 8, 1965, he referred the agents to those attorneys for certain information. At another meeting on March 1, 1965, when the agents requested the execution of consent forms for an extension of the statute of limitations (Form 872), Petitioner telephoned his attorneys and arranged to meet with them to discuss the execution of these forms. On March 12, 1965, he again referred the agents to his attorneys for certain information. The agents never spoke to the attorneys to whom they had been referred because these attorneys never filed with the Internal Revenue Service the required Powers of Attorney (App. 39b).

Defendant was indicted on November 22, 1966 (App. 40b).

The District Court in its Pre-Trial Opinion on the Motion to Suppress and its Post Trial Opinion for Judgment of Acquittal and the Court of Appeals concluded that despite the facts that (a) almost two years before the tax examination of the Petitioner allegedly began, the Intelligence Division had requested that he be subject to a Post Office Department mail cover which was imposed and con-

5. The District Court in its Pre and Post Trial Opinions did find that Petitioner was warned of his right to remain silent, (App. 12b, 27b) but this is contrary to the written memorandum of the warnings given, confirmed to be complete and accurate by both the Revenue and Special Agents. Further, the Court below observed that there was disclosed to the accountant, but not to Petitioner, a possible tax fraud charge (App. 46b, 16b).

tinued until after his case was assigned to the Revenue Agent, (b) that the so-called civil examination was undertaken by a revenue agent who shortly prior thereto had his office transferred from its regular quarters in the Audit Division to a physical location with the Intelligence Division, the criminal arm of the Internal Revenue Service and (c) the examination was part of the "organized crime drive", nevertheless, the initial investigation was routinely civil with no affirmative duty on the part of the Revenue Agent to warn of any contemplated criminal prosecution (App. 15b, 17b, 27b, 46b). In further support thereof, the Court below relied on the fact that there was submitted to the jury the charge that (App. 45b-46b)

> "Any information, papers, business books, records, documents or oral or written admissions which you find were obtained from the defendant or his accountant by Government agents by any fraud, force, persuasion, misrepresentation, trickery, or deceit, should not be considered by you against the defendant. It is for you to determine whether or not information or leads were obtained in this manner—that is for you, ladies and gentlemen—just as you must determine the reliability of the Government's computations to your satisfaction beyond a reasonable doubt"

completely ignoring that at the same time, the trial Judge took the matter from the province of the jury by a further charge that (558a)

> "In this same connection, however, you should note that none of the evidence which we have let in is defective for any lack of warning on the part of the Government's agents to Defendant or his accountant. That is, as far as you are concerned, in this case, we have ruled that the Government's agents did all they

were required to do in the way of giving legal warnings".

With respect to the requirement that full *Miranda* warnings be given to a taxpayer once he becomes the focus of a criminal investigation, the Court below rejected the teachings of the *United States of America v. Dickerson*, 413 F. 2d 1111, (7th Cir. 1969) and concluded that the affirmative duties imposed to give the full *Miranda* warnings, which admittedly were not given to Petitioner, arise only in a custodial setting where the government agency has in some meaningful way subjected the taxpayer to physical, or perhaps psychological, restraint (App. 42b). Thus the Court felt that it was not required to depart from its pre *Miranda* rule that the sole test for admissibility of a taxpayer's statements to agents of the Treasury Department is the voluntariness of the statements, holding *sub silentio* that a confession can still be voluntary even where it is not shown that the Defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of the questioning (App. 45b).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Conflict With the Rationale of the Decision of This Court in United States v. Kordel, 397 U. S. 1 (1970), Barring Use of Evidence Obtained in a Search for Criminal Purposes Conducted Under the Guise of an Examination for Purely Civil Purposes.

This Court, in *Kordel*, where answers to the Government's interrogatories in a Food and Drug Administration civil libel to condemn certain products did not bar their use in a criminal trial as violative of the Fifth Amendment, due process or departure from proper standards of administration of justice, since the Food and Drug Administration was not required to choose either to forego recommendation of criminal action once it sought civil relief or to defer civil proceedings pending outcome of the criminal trial, specifically stated at pages 11-12 that

> "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution [23] or has failed to advise the defendant in civil proceedings that it contemplates his criminal prosecution, [24] . . .

citing in footnote 24, the following:

> "See *Smith v. Katenbach*, 122 U. S. App. D. C. 113, 114-116, 351 F. 2d 810, 811-813; *U. S. v. Lipshitz*, 132 F. Supp. 519, 523; *U. S. v. Guerrina*, 112 F. Supp. 126, 128."

Both the *Lipshitz* and *Guerrina* cases involved joint tax investigations where the taxpayer was not informed of the criminal nature of the investigation. Judge Clary in the *Guerrina* case at page 128 stated

> "I can see no difference between a search conducted after entrance has been gained by stealth or in

> the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes. Whether the arrangement to have Agent Coram make the appointment with the defendant was by design to obtain entrance for Special Agent Pearson, or whether it was done innocently, the effect in so far as the defendant was concerned was the same. He was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes."

Similarly, Judge Rayfiel in the *Lipshitz* case at page 523 stated

> "I am satisfied that from June 30, 1948, the day Potts was assigned to the case, he, together with Obst, were jointly engaged in the preparation of the case for the criminal prosecution of the defendant, and that they did not inform him, nor did he know, that they were so engaged. Pott's assignment of Obst, a Revenue Agent, to obtain, without the Defendant's knowledge and consent, extensive information and extracts from the taxpayer's books and records, far in excess of those required for the customary routine audit of a Revenue Agent, cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge."

So also, although the *Smith v. Katenbach* case went off on a procedural point, it also involved an attack on the use of answers to questions by a special agent without warning to the defendant-taxpayer that the agents were there for criminal purposes.

Moreover, the Court below felt completely free, despite the decision of this Court in *Miranda v. Arizona*, 384 U. S.

436 (1966), to continue to apply its pre *Miranda* rule that the sole test for admissibility of a taxpayer's statements to agents of the Treasury Department is the voluntariness of the statements, citing its earlier decisions in *United States v. Frank*, 245 F. 2d 284, (1957) *cert. denied* 255 U. S. 819 and *United States v. Burdick*, 214 F. 2d 768, (1954) *cert. denied* 350 U. S. 831. It is true these cases probably did stand for the proposition that even though the routine tax audit was a guise or scheme to investigate contemplated fraud prosecution, there was no duty on the part of the agent to notify the taxpayer of the true criminal purpose of the investigation or warn him of his constitutional rights.

However, the authority for these decisions rests on two earlier Supreme Court decisions, *Wilson v. United States*, 162 U. S. 613 (1896) and *Powers v. United States*, 223 U. S. 303 (1912), under which ignorant compliance with the request of authorities was equated with a valid waiver of constitutional rights. These authorities cannot survive *Miranda*, even without the applicability of the requirement for full warnings, which teaches at the least, that one confronted with governmental auhority in an adversary situation must be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. *United States v. Dickerson*, 413 F. 2d 1111 (7th Cir., 1969); *United States v. Turzynski*, 268 F. Supp. 847 (N. D. Ill., 1967). It would seem to be not open to dispute that the Petitioner could not be deemed to have made any voluntary statements as a result of interrogation by the Revenue Agent if he did not know that he was being charged with or was suspected of the commission of a crime and that the government was seeking his aid to convict himself.

The Court below found comfort that the issue of fraud and deceit of the Revenue Agent was decided adversely to

the Petitioner by the finding of guilty in view of the charge that the jury should not consider any evidence obtained as a result of fraud, force, persuasion, misrepresentation, trickery or deceit,[6] whereas in fact, the fraud and deceit matter was wholly taken from the province of the jury by further amplification that the jury (558a)

> "should note that none of the evidence which we have let in is defective for any lack of warnings on the part of the Government's agents to Defendant or his accountant. That is, as far as you are concerned, in this case, we have ruled that the Government's agents did all they were required to do in the way of giving legal warnings"

Once the jury verdict is shorn of its probative value, as it must be, nothing is left to refute the contention that from the outset the tax investigation of the Petitioner must be considered as having been oriented toward a criminal prosecution.

The decision below, if allowed to stand, has far reaching and continuing implications on permissible conduct of the Intelligence Division of the Internal Revenue Service. At the present time, as the Court below pointed out (App. 45b), a special agent is required to follow a revised procedure for advising a taxpayer of his rights during his investigation, by identifying himself, describing his criminal function and advising the taxpayer of his right to remain silent, not to incriminate himself and to have counsel present. Whether or not these warnings are demanded by the Constitution, the proper standards of the administration of justice require that they be followed. The rights are not so fragile that they can be thwarted, as would appear

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6. Citing the decision of this Court in *Smith v. United States*, 348 U. S. 147, 151 (1954) (App. 45b-46b).

by the instant case, by the simple device of assigning a revenue agent to the Intelligence Division instead of assigning a special agent to the case.[7]

It is relatively unimportant whether the Court below was in error, as it was, in observing that by postal regulations in force at the time of Petitioner's examination, a mail cover was authorized for both civil and criminal purposes (App. 46b).[8] The Government has made no attempt to suggest that the Intelligence Division, the criminal arm of the Internal Revenue Service, singled out the Defendant, an alleged racketeer, as early as February 18, 1961 for some civil purpose in requesting the mail cover at that time (50a-51a). The mail cover continued until March 12, 1963 and it is interesting to note that after the Revenue Agent was assigned the case, on December 3, 1962, in connection with the organized crime drive, the mail cover still

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7. The recurring nature of the problem and the need that it be settled by this Court is illustrated by such lower Court cases as *United States v. Prudden*, 424 F. 2d 1021 (5th Cir. 1970); *United States v. Habig*, 413 F. 2d 1108, ftn. 4 (7th Cir., 1969); *Goodman et al. v. United States*, 285 F. Supp. 245 (D. C. C. D. Calif., 1968); *United States v. Tonahill*, 70-2 USTC § 9511 (5th Cir., 1970); *United States v. Moon*, 70-2 USTC § 9491 (D. C. W. D. Wisc., 1970); *United States v. Bednarski*, 312 F. 2d 913 (D. C. Mass., 1970).

8. The assertion by the Court below that Sub-Chapter 860, part 861 of the Postal Manual of 1965 providing in Section 861.42 "The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

a. When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security, (2) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime."

restricted the authorization to criminal purposes whereas during the period 1961 to 1963, it could be used for civil purpose, appears to be entirely gratuitious.

was continued by the Intelligence Division until about a week before the Revenue Agent made his initial contact with the Petitioner.

Thus, the instant case clearly presents an appropriate occasion for this Court to define the limits to which the Internal Revenue Service may go in concealing from a taxpayer in a supposedly routine civil examination that it contemplates his criminal prosecuton, in accordance with the pronouncements of this Court in the *Kordel* and *Miranda* cases.

2. The Decision Below Is in Conflict With the Decision of the 7th Circuit in United States v. Dickerson, 413 F. 2d 111 on the Requirement for the Full Miranda Warnings in a Criminal Tax Investigation.

The Court below held that the affirmative duties imposed to give the full *Miranda* warnings in a tax investigation, which admittedly were not given to Petitioner, arise only in a custodial setting where the Government agency, in this case the Intelligence Division of the Internal Revenue Service, has in some meaningful way subjected the taxpayer to physical or perhaps psychological restraint on his freedom of action. It rejected the contention that once the Intelligence Division is in the picture, such psychological restraint does exist and allied itself with the Courts of Appeals of each of the Circuits other than the 7th Circuit that the requisite coercion in this Court's decision in *Miranda v. Arizona*, 384 U. S. 456 (1966) focused on custody and custodial interrogation (App. 41b-42b).

But custody and custodial interrogation were not the only significant events in *Miranda*. *Miranda* is in part an explication of the principles of *Escobedo v. State of Illinois*, 378 U. S. 478 (1964) which had elevated to importance the point at which the criminal process focuses on an accused.

Accordingly, *Miranda* also refers to the beginning of the adversary process as a major point of significance. 384 U. S. at 477. Thus, the 7th Circuit in the *Dickerson* case has rejected the physical custody approach and as the Court below recognized has held that the *Miranda* warnings must be given by the agent once a tax investigation is shifted to one criminal in nature on the theory that the taxpayer is found out to be "deprived of his freedom of action in [a] significant way" when questioned by the Revenue or Special Agents, even though the interview may have taken place in the taxpayer's home or place of business. Thus, the adversary process in the tax investigation is found to focus on the taxpayer at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division, with sufficient coercion and restriction of freedom of action present in the interrogation of the tax suspect even outside the allegedly hostile and forbidding atmosphere of the typical police station.

Accordingly, the Court below misunderstood and improperly applied the pronouncements of this Court in *Miranda* and created by its decision serious conflict with the *Dickerson* decision.

CONCLUSION.

The decision below is incorrect. There is conflict with the pronouncements of this Court in *Kordel* and *Miranda* and with the decision of the Court of Appeals of the 7th Circuit in *Dickerson*. The occasion is appropriately presented for the first time for this Court to define the realistic confines of the application of the full *Miranda* warnings to tax investigations and to thwart the growing attempt by the Internal Revenue Service to use the guise of a routine tax examination as a vehicle only for obtaining evidence of criminal responsibility, in violation of Constitutional rights and a departure from the proper standards of the administration of justice. The petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

LEONARD SARNER,
BURTON K. STEIN,
SARNER, COOPER & STEIN,
Counsel for Petitioner.

APPENDIX A.

Pretrial Opinion and Order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL No. 22706.

UNITED STATES OF AMERICA

v.

FRANK A. JASKIEWICZ

OPINION AND ORDER.

(As amended by Order of January 17, 1968)

TROUTMAN, *J.* JANUARY 2, 1968.

This matter is before the Court for disposition of several motions made by defendant in advance of trial.

On or about November 22, 1966, the defendant, Frank A. Jaskiewicz, was indicted in this Court for attempting to evade or defeat a large part of his individual income tax for the calendar years 1960 to 1963, inclusive.[1] On or about December 14, 1966, the defendant was arraigned in this Court and entered a plea of not guilty as charged.

1. 26 U. S. C. § 7201 provides:

"§ 7201. Attempt to evade or defeat tax. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68n A. Stat. 851."

We have before us for disposition the defendant's motions for a bill of particulars, to suppress certain evidence and to dismiss the indictment. In that each of the several motions involve different factual and/or legal issues, they will be discussed *seriatim*.

MOTION FOR BILL OF PARTICULARS.

In item one of his motion, the defendant requests the Court to direct the attorney for the United States to inform him of the method of computation to prove alleged unreported income; if it is the net worth and expenditure method of computation the defendant seeks additional information concerning the period during which the Government will offer proof of the defendant's net worth, the date of the opening net worth and the opening and closing net worth for each year in the period the Government will offer its proof, including specific items for each year in the period as set forth in his motion. The attorney for the Government has advised counsel for the defendant that the Government is relying on the net worth and expenditure method of computation; the defendant has withdrawn his motion with respect to the remaining particulars requested in item one. Accordingly, in that the parties have amicably resolved their differences with respect to item one, no further comment need be made with respect thereto.

In item three of his motion, the defendant requests the Court to direct the attorney for the Government to inform him of the source of the alleged unreported income, specifying whether it is from criminal activity; and, if it is from criminal activity, specify the nature of the alleged criminal activity. *In item two* of his motion, the defendant requests the Court to direct the attorney for the Government to furnish him with a list of the names and addresses of witnesses the Government intends to use at the trial; however, since the filing of his motion, the defendant has limited his re-

quest for the names and addresses of witnesses to those that the Government intends to us to identify the defendant with the source of the alleged unreported income, if that source be criminal.

An application for a Bill of Particulars, made pursuant to the provisions of Rule 7(f) of the Federal Rules of Criminal Procedure,[2] is one addressed to the sound discretion of the Court. *Wong Tai v. United States*, 273 U. S. 77 (1927); *United States v. Kafes*, 214 F. 2d 887 (3rd Cir. 1954). In exercising its discretion, it is the function of the Court to insure that the Government has presented its allegations with sufficient particularity and definiteness to unequivocally inform the accused of the specific nature of the charges upon which the indictment is laid. The extent to which the accused should be so informed must be considered in the light of the recent amendment to Rule 7(f) which, in eliminating the necessity of showing cause for the grant of a Bill of Particulars, was "designed to encourage a more liberal attitude by the courts toward bills of particulars, without taking away the discretion which courts must have in dealing with such motions in individual cases". See *Advisory Committee's Note to 1966 Amendment to Rule 7(f), Federal Rules of Criminal Procedure.*

The net worth method of proving that a taxpayer has understated his net taxable income involves a comparison of the taxpayer's net worth at the beginning of the taxable year with his net worth at the end of the year, with appropriate adjustments for nontaxable receipts and nondeductable expenditures. A group of Supreme Court decisions

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2. Rule 7(f) of the Federal Rules of Criminal Procedure:

"(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires. As amended Feb. 28, 1966, Eff. July 1, 1966."

affirmed convictions in four cases where the net worth method was used; but the opinions expressed grave concern for the potential abuses of the method, and attempted to set the permissible limits for this type of prosecution. *Holland v. United States*, 348 U. S. 121 (1954); *Friedberg v. United States*, 348 U. S. 142 (1954); *Smith v. United States*, 348 U. S. 147 (1954); *United States v. Calderon*, 348 U. S. 160 (1954). One such limitation is that the Government must show more than an increase in net worth; i.e., evidence must be introduced which will support an inference that the net worth increase is attributable to currently taxable income. To sustain its burden in this regard, the Government must establish that there is a likely source of or negate all possible nontaxable sources for the net worth increase. *Holland v. United States, supra; United States v. Massei*, 355 U. S. 595 (1958).

Recognizing the potential abuses inherent in the net worth method, and the consequent burden placed upon the Government in establishing its case, it would appear that an accused in a net worth case is not only entitled to be informed of the nature of the charge or claim against him, but the charge or claim must be so distinct and so specific as to minimize the potential abuses inherent in a net worth prosecution. Since the Supreme Court has directed, as a condition precedent to conviction in a net worth case, that the Government introduce evidence which will support an inference that the net worth increase is attributable to currently taxable income, the accused should have a reasonable opportunity to rebut that inference. To afford an accused such an opportunity, it is essential that he be informed in advance of trial of whether the Government intends to prove the existence of a likely source, and if so, the nature of that source, or intends to negate all possible nontaxable sources. This is especially true today when the

criminal discovery rules are being liberalized to afford the defendant the opportunity to more adequately prepare his defense. In commenting upon the liberalization of the criminal discovery rules in connection with a net worth case, the District Court, in *United States v. Rosenfeld*, 264 F. Supp. 760 (N. D. Ill. 1967), in compelling the Government to disclose the likely sources of the alleged unreported income, stated at page 763:

> "* * * The time is rapidly approaching when 'surprise' will be eliminated from the criminal trial, and the 'sporting theory of justice' will be a relic of the past for criminal defendants as it is already for civil litigants. See e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U. L. Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L. J. 477."

Accordingly, assuming the Government intends to prove a likely source, we grant defendant's motion for a Bill of Particulars with respect to item three, to the extent the information requested therein is available to the Government.

While a Bill of Particulars may require a disclosure of certain items, it is not a device by which a defendant may compel the Government to disclose its evidence in advance of trial. *Wong Tai v. United States, supra.* The "more liberal attitude" suggested by the Advisory Committee in their Amendment to Rule 7(f) is not meant to alter the primary purpose of a Bill of Particulars which is to apprise the defendant of the crime charged with sufficient particularity so as to enable him to prepare a proper defense and avoid prejudicial surprise at trial. The names and addresses of witnesses is normally an evidentiary matter and since the defendant is not charged with "treason or other capital offense" the defendant's motion for their dis-

closure is addressed to the discretionary power of this Court.[3] The only reason advanced by the defendant for his request is that were it denied it would be "exceedingly and unreasonably difficult". Although ". . . it is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial" (*Will v. United States*, — U. S. —, opinion of 11/13/67, No. 36, at p. 9), this Court is of the opinion that the reason advanced by the defendant in the case *sub judice*, if indeed it be a reason, is not so compelling as to warrant this Court in deviating from the general rule that the names and addresses of witnesses is purely an evidentiary matter and their disclosure is not required in advance of trial. *United States v. Diliberto*, 264 F. Supp. 181 (S. D. N. Y. 1967); *United States v. Baker*, 262 F. Supp. 657 (D. C. D. C. 1966); *United States v. Chase*, 372 F. 2d 453 (4th Cir. 1967); *United States v. Margeson*, 261 F. Supp. 628 (E. D. Pa. 1966). Accordingly, the defendant's motion with respect to item two is denied.

MOTION TO SUPPRESS.

In item one of his motion, the defendant requests the Court to suppress the testimony and workpapers of his accountant, Allen Speiser, on the ground that his compelled testimony would violate the accountant-client privilege created by a Pennsylvania statute which provides:

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3. 18 U. S. C. § 3432 provides:

"§ 3432. Indictment and list of jurors and witnesses for prisoner in capitla cases.

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness. June 25, 1948, c.645, 62 Stat. 831."

"§ 9.11a Privileged communication

"Except by permission of the client or person or firm or corporation engaging him or the heirs, successors or personal representatives of such client or person or firm or corporation, a certified public accountant or a person employed by a certified public accountant shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed relative to and in connection with any professional services as a certified public accountant other than the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make or requested by a prospective client to discuss. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, however, That nothing herein shall be taken or construed as modifying, changing or affecting the criminal or bankruptcy laws of this Commonwealth or of the United States. 1947, May 26, P. L. 318, § 11.1, added 1961, Sept. 2, P. L. 1165, § 8."

(See 63 P. S. § 9.11a)

In the absence of a statute, there is no privilege with respect to communications made to an accountant by an employer for the purpose of preparing financial statements or doing other work characteristically performed by accountants. Since the privilege is in derogation of the common law and an exception to the general rule that all persons having knowledge of the facts are required to testify, the Pennsylvania statute creating the privilege must be strictly construed. Indeed, Professor Wigmore has cautioned against the expansion of privileges, stating:

"For more than three centuries it has now been recognized as a fundamental maxim that the public (in

the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule:

• • •

"(3) • • • The investigation of truth and the enforcement duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice."

(See 8 Wigmore on Evidence (McNaughton Revision 3rd Ed.) Sec. 2192, pp. 70, 73.)

Keeping in mind that the investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges, the Pennsylvania statute creating the privilege contains a proviso whereby: "• • • nothing herein shall be contained or construed as modifying, changing or affecting the criminal • • • laws • • • of the United States". The construction of the statute urged by counsel for the defendant would certainly affect the criminal laws of the United States and the application of the statute under those circumstances is precluded by its express terms. We need not, therefore, reach the broad question as to whether an accountant-client privilege created by State law can prevail in the execution of Federal tax laws inasmuch as in the instant case the provisions of the Pennsylvania statute clearly except from its coverage the privilege asserted by the defendant.

However, assuming *arguendo* that the Pennsylvania statute extends to defendant the privilege which he seeks to assert, it seems clear that it is not applicable in a Federal criminal trial. In *Falsone v. United States*, 205 F. 2d 734 (5th Cir. 1953), an internal revenue agent served a summons on a certified public accountant to compel the accountant to appear before the agent and testify concerning the tax liability of taxpayers and to compel the accountant to bring with him certain books and papers relating to income tax returns of the taxpayer. One of the arguments advanced by the accountant was that the State of Florida, by specific statute, has made privileged all communications between certified public accountants and their clients. The 5th Circuit held that the competency and privilege of witnesses is not governed by State law and the accountant could not rely upon the Florida statute to avoid disclosure.

Similarly, the Second and Seventh Circuits have approved the rationale of *Falsone v. United States, supra; Federal Trade Commission v. St. Regis Paper Co.*, 304 F. 2d 731 (7th Cir. 1962); *Colton v. United States*, 306 F. 2d 633 (2nd Cir. 1962). The Court of Appeals for this Circuit has not as yet had an opportunity to squarely pass upon the question of the applicability of the Pennsylvania statute involved herein, but the decisions of the Circuit Court, and of the District Courts within this Circuit, seem to indicate that they are in agreement with the decision in the *Falsone* case.

In *Lustman v. Commissioner Internal Revenue*, 322 F. 2d 253 (3rd Cir. 1963), taxpayers sought review of a decision of the Tax Court wherein it was determined that there were deficiencies in the tax liability reported for the years in question. In commenting upon the accountant-client privilege, the Court noted as follows at page 259:

> "Confidential communications between a client and an accountant are not generally recognized as privileged.

> There is no sanction for the privilege in common law. See 8 Wigmore, Evidence, § 2286 (McNaughton rev. 1961). And there is no state or federal statute applicable here which would confer such privilege. Moreover, where records relating to tax liability are the subject matter of inquiry, the Internal Revenue Code, Section 7602 (26 U. S. C. A. § 7602), negates any privilege which might otherwise exist. See Falsone v. United States, 5 Cir. 1953, 205 F. 2d 734, cert. den. 346 U. S. 864, 74 S. Ct. 103, 98 L. Ed. 375; In the Matter of James E. Fahey, D. C. Ky. 1961, 192 F. Supp. 492, aff'd 6 Cir. 1961, 300 F. 2d 383."

Although the Court's decision, as manifested by the above quotation, involved communications which were prior to the Pennsylvania statute conferring the privilege, the Court did cite the *Falsone* case with approval. Indeed, in *United States v. Bowman,* 236 F. Supp. 548 (M. D. Pa. 1964), at page 551, in commenting upon the *Falsone* case, the Court noted that: "In my opinion, the decision in the Falsone case (supra) is based on sound and logical reasoning. The great weight of authority appears to be in agreement with it". Although on appeal in *United States v. Bowman,* 358 F. 2d 421 (3rd Cir. 1966), the Circuit Court did not find it necessary to squarely pass upon the applicability of the Pennsylvania statute conferring the accountant-client privilege, it is the conclusion of this Court that although the rule might be different in diversity cases, a State-created accountant-client privilege is not applicable in a Federal criminal trial.

This is especially true in view of Rule 26 of the Federal Rules of Criminal Procedure which provides, inter alia:

> "* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed,

except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Moreover, insofar as Mr. Speiser's being required to testify before the Grand Jury is concerned, this question has been decided in this very case adverse to the contentions of the defendant by Judge Van Dusen, then a member of the District Court and now a member of the Court of Appeals, in his "Memorandum In Amplification of Ruling Directing Allen Speiser to Testify Before The Grand Jury". See *In Re: Grand Jury Investigation Concerning Frank A. Jaskiewicz, Misc. No. 3256, April 22, 1966.*

Accordingly, the defendant's motion to suppress the testimony and workpapers of his accountant is denied.

In item two of his motion, the defendant requests the Court to suppress evidence of any written, recorded or oral statements or confessions of the defendant obtained by Government agents, and any leads obtained therefrom.

The record shows that the Internal Revenue Service undertook an investigation of the income tax liabilities of the defendant on or about December 3, 1962. The agent who was assigned to investigate the civil tax liability of the defendant was Constantine A. Daniels. Pursuant to his investigation, Mr. Daniels met with the defendant on or about March 26, 1963. Mr. Daniels gave the defendant no warnings with respect to his alleged constitutional rights to remain silent, not to incriminate himself, to representation by counsel and the like.

On or about April 14, 1964, Mr. Daniels referred the matter to the Intelligence Division for investigation by a special agent with a view towards possible recommendation of criminal prosecution of the defendant. The special agent assigned to investigate the case was Joseph V. Maser. On

or about June 9, 1964, when the defendant's accountant was confronted by Mr. Maser and informed that the investigation had changed in character from civil to criminal, the accountant arranged a meeting with the agents at the defendant's place of business. On or about June 11, 1964, pursuant to the arrangements made by the defendant's accountant, Messrs. Maser and Daniels met with the defendant at the defendant's place of business to discuss the matter.

The defendant was warned of his constitutional rights to remain silent and not to incriminate himself. He was not warned of his right to representation by counsel. Although neither agent informed the defendant that the investigation had changed in character from one of concern with civil tax liability to one with a view toward possible recommendation of criminal prosecution, as was noted previously, Mr. Maser had so informed the defendant's accountant who thereafter arranged the meeting. Moreover, Mr. Maser identified himself to the defendant as a special agent and a special agent by nature is one conducting an investigation with a view towards possible recommendation of criminal prosecution.

Although conceding that the defendant was not in custody at the time the meetings were held, the defense advances the principles of *Escobedo v. State of Illinois,* 378 U. S. 478 (1964), and of *Miranda v. State of Arizona,* 384 U. S. 436 (1966) and claims that these have application to both meetings because the defendant was not given any warnings at the first meeting and was not warned of the criminal character of the investigation and his right to representation by counsel at the second meeting.

In commenting upon the Escobedo-Miranda issue, and the question of the extension of the "custodial interrogation" language, p. 444 of 384 U. S., to noncustodial internal revenue service conferences, the Court of Appeals for the

8th Circuit, in *Frohmann v. United States,* 380 F. 2d 832 (8th Cir. 1967), stated at pages 835 and 836:

> "Whenever the question has been presented to a court of appeals, the court has refused to extend the Escobedo and Miranda requirement for the rendition of advice as to the right to counsel to the situation of a precustody internal revenue service inquiry. Morgan v. United States, 377 F. 2d 507 (1 Cir. (1967); Schlinsky v. United States, 379 F. 2d 735 (1 Cir. 1967); Mathis v. United States, 376 F. 2d 595 (5 Cir. 1967); United States v. Maius, 378 F. 2d 716 (6 Cir. 1967); Kohatsu v. United States, 351 F. 2d 898 (9 Cir. 1965), cert. den. 384 U. S. 1011, 86 S. Ct. 1915, 16 L. Ed. 2d 1017; Rickey v. United States, 360 F. 2d 32 (9 Cir. 1966), cert. den. 385 U. S. 835, 87 S. Ct. 80, 17 L. Ed. 2nd 69; Selinger v. Bigler, 377 F. 2d 542, (9 Cir. 1967), cert. applied for June 30, 1967. See United States v. Spomar, 339 F. 2d 941 (7 Cir. 1964), cert. den. 380 U. S. 975, 85 S. Ct. 1336, 14 L. Ed. 2d 270. The great majority of unappealed district court cases in which the question has arisen are to the same effect. Bohrod v. United States, 248 F. Supp. 559, 564-566 (W. D. Wis. 1965); Smith v. United States, 250 F. Supp. 803 (D. N. J. 1966); United States v. Fiore, 258 F. Supp. 435 (W. D. Pa. 1966); United States v. Hill, 260 F. Supp. 139 (S. D. Cal. 1966); United States v. Carlson, 260 F. Supp. 423 (E. D. N. Y. 1966); United States v. Spinney, 264 F. Supp. 774 (D. Mass. 1966); Stern v. Robinson, 262 F. Supp. 13 (W. D. Tenn. 1966); United States v. Gleason, 265 F. Supp. 880, 883 (S. D. N. Y. 1967); United States v. Neves, 269 F. Supp. 158 (S. D. N. Y. 1967); United States v. Rabin, 271 F. Supp. 190 (S. D. N. Y 1967).
>
> "To the contrary, seemingly, are only United States v. Turzynsky, 268 F. Supp. 847, N. D. Ill. 1967;

United States v. Kingry, 67-1 USTC par. 9262, 19 AFTR 2d 762 (N. D. Fla. 1967); and United States v. Schoenburg, 67-1 USTC par. 9393 (D. Ariz. 1965). See United States v. Harrison, 265 F. Supp. 660 (S. D. N. Y. 1967). But Mr. Justice Douglas dissented from the denial of certiorari in Thomas v. United States, 286 U. S. 975, 87 S. Ct. 1164, 8 L. Ed. 2d 133 (1967), with the observation, that, 'This is not an in-custody case, but it is a coercive examination of taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one'.

"All these cited cases have been decided since Escobedo and many of them since Miranda. Their facts, of course, vary. *It is clear, however, in a number of them, that the internal revenue service review had reached the stage where a special or intelligence agent was in the case and was present at the conference.*" (Emphasis supplied.)

Like the Court of Appeals for the 8th Circuit, we feel that the massive weight of authority cited in its opinion adverse to the contentions of the defendant "comprise an impressive list and we would be loathe to oppose them". *Frohman, supra,* p. 836.

Among the cases cited by the 8th Circuit Court of Appeals, in its opinion in *Frohman, supra,* there were denials of certiorari in *Schlinsky* (36 Law Week 3173); *Thomas* (386 U. S. 975); *Maius* (36 Law Week 3161); and *Selinger* (36 Law Week 3161); and a grant of certiorari in *Mathis* (36 Law Week 3161). We recognize that the denial of certiorari imports nothing as to the merits of the case. All it means is that, for whatever reason, there were not four members of the Court who wished to hear the case. Brown v. Allen, 344 U. S. 443 (1953). It is interesting to note, how-

ever, that unlike the cases in which certiorari was denied, and unlike the case at bar, in *Mathis* the defendant was incarcerated under sentence for an unconnected offense at the time of the interview with the revenue agnts.

The present case, however, is not without its own peculiar features and they deserve further comment.

The evidence establishes that until April 14, 1964, when defendant's case was initially referred to agents of the Intelligence Division, the inquiry concerning the defendant's tax liability represented no more than a routine civil tax investigation. It cannot be disputed that incident to every routine tax audit there exists a possibility that evidence of fraud may be uncovered, perhaps resulting in a referral of the case to the Intelligence Division. However, the presence of this factor is certainly not sufficient to render a routine civil tax investigation an investigation with a view toward the recommendation of possible criminal prosecution, thereby constituting the defendant an "accused" within the meaning of Escobedo-Miranda, entitling the defendant to warnings at the first meeting with Mr. Daniels.

At both of the interviews in question, the defendant does not expressly assert that the evidence was obtained by coercion, fraud, misrepresentation or deceit, or other than voluntarily. Rather, the defendant urges that deception was implicit in the failure of Internal Revenue agents to apprise the defendant when their investigation became in fact an inquiry into possible criminal conduct, and likewise in their failure to warn the defendant of his constitutional rights at such time.

In this connection, the defendant makes reference to an Internal Revenue Service News Release, No. 897, October 3, 1967, which provides:

> "On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and

> state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud'.
>
> "If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

Special Agents are instructed to give the warnings prescribed by the News Release even though the taxpayer is not in custody. The defendant contends that the failure of Mr. Maser to comply with the News Release and warn him that the investigation had changed in character from civil to criminal and of his right to representation by counsel is tantamount to a deprivation of his constitutional rights. In this connection, it is to be noted that the News Release itself, which the defendant apparently contends is evidence of the fact that the right exists, recognizes that:

> "Instructions issued to IRS Special Agents *go beyond most legal requirements* to assure that persons are advised of their Constitutional rights." (Emphasis supplied.)

Moreover, in the case at bar, the defendant's accountant who arranged the meeting with the special agent was informed by the agent that the investigation had changed in character from civil to criminal. However, all else to the contrary notwithstanding, constitutional rights are a matter for the Court, and the suggestion by defendant that administrative policy necessarily be raised to the level of a constitutional mandate is completely devoid of merit.

In formulating the constitutional rights at issue in the case at bar, the Supreme Court in *Miranda,* in expressly limiting application of its decision to cases involving "custodial interrogation", stated:

"* * * By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * *"

(See 384 U. S. 436, at 444.)

Such language obviously contemplates the incommunicado interrogation of individuals in a police dominated atmosphere. On the date of the first interview, no criminal investigation had been instituted or contemplated. Although at the time of the second interview a criminal investigation had been instituted or contemplated, and the defendant may therefore have been an accused within the meaning of Escobedo-Miranda, in that the interview was conducted at the defendant's place of business and at the behest of his accountant, the defendant cannot properly be regarded as being subjected to the overbearing psychological pressures incident to the "custodial interrogation" contemplated in *Miranda*.

Accordingly, the defendant's motion to suppress evidence obtained by the Government from interviews with the defendant is denied.

MOTION TO DISMISS.

In 1964, the defendant was first informed by the Internal Revenue Service that the character of the investigation had changed from civil to criminal and that he might be criminally prosecuted for violation of the Federal income tax laws. Statutory notices of deficiency were then issued ("90-day letter"), on December 30, 1964, for the years 1957 and 1958; on April 15, 1966, for the years 1959 and 1962; on June 15, 1966, for the years 1960 and 1961, giving the defendant ninety days within which to file petitions if he

wished to contest the proposed deficiencies in the Tax Court.[4] Electing to contest the asserted deficiencies, the defendant filed petitions in the Tax Court setting forth his position and alleging errors in the Commissioner's determination of deficiencies. The Department of Justice initiated the present criminal case by submitting the matter to the Grand Jury for investigation on April 21, 1966, charging the defendant with wilfully attempting to evade his Federal income taxes. On November 22, 1966, more than five months after the last statutory notice of deficiency was issued, the defendant was indicted for wilfully attempting to evade his Federal income taxes for the calendar years 1960 to 1963, inclusive.

The defendant has filed the instant motion seeking dismissal of the indictment on two grounds. The first ground for dismissal asserted by the defendant is that because of

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4. 26 U. S. C. § 6213 provides, inter alia, as follows:

"(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such noticed has been mailed to the taxpayer, nor until the expiration of such 90-day or 159-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

"(c) Failure to file petition.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate."

the statutory notices of deficiency and Tax Court proceeding he has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself in violation of the Fifth Amendment to the Constitution. The second ground for dismissal asserted by the defendant is that there is an administrative practice of making no assessments in advance of criminal proceedings and that failure to extend the policy to him can only be equated with systematic discrimination and a violation of the equal protection aspects of the due process clause of the Fifth Amendment to the Constitution.

In *United States v. Blue,* 384 U. S. 251 (1966), a case ditrectly on point, the Supreme Court held that the lower court erred in granting the defendant's pretrial motion for dismissal of the indictment on the ground that because of the jeopardy assessment and Tax Court proceeding the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself. In this connection, the Court stated, 384 U. S. 251, at pp. 254 and 255:

> "On the merits of the case, we do not believe that the District Court should have dismissed the indictment. The Government has argued that the statements made by Blue in his Tax Court petitions were no more than successive denials of the alleged underpayments and do not constitute incriminating evidence. The Government has also intimated that by merely providing the occasion for the filing of Blue's petitions in fulfilling its statutory duty to make jeopardy assessments and send deficiency notices, it ought not be regarded as compelling the taxpayer to incriminate himself within the meaning of the Fifth Amendment. There is no need, however, to consider these or other contentions that may point in the same direction.

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules wher evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. Weeks v. United States, 232 U. S. 383; Rogers v. Richmond, 365 U. S. 534; Mapp v. Ohio, 367 U. S. 643; Nardone v. United States, 308 U. S. 338; Mallory v. United States, 354 U. S. 449. Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

Accordingly, the defendant's motion to dismiss the indictment on the ground that the defendant has been and will be compelled to incriminate himself is denied.

In the *Blue* case, *supra,* the lower court did not expressly consider the defendant's second contention that there is an administrative practice of making no assessments in advance of criminal proceedings and that failure to extend the policy to the defendant was a denial of due process. Since this ground for dismissal was not supported by the record, the Supreme Court refused to pass upon its merits and reserved to the defendant the opportunity to articulate his argument on administrative policy on remand to the lower court: 384 U. S. at 256.

Perhaps the best evidence of the administrative policy in question is an excerpt from the Policy Manual of the Internal Revenue Service which states, inter alia:

> "The primary purpose of criminal tax proceedings is to make an example of the defendants in order to encourage public respect for the tax laws and to deter others from similar violations. Experience has demonstrated that attempts to prosecute both the criminal and the civil aspects of a case concurrently may seriously militate against success with respect to either. It is therefore necessary, in the over-all interests of enforcement of the law, that the imposition of criminal sanctions in the cases selected for prosecution should be considered paramount in relation to the civil tax aspects of the cases.
>
> "Accordingly, jeopardy and deficiency assessments will not be made, waivers and consents will not be requested, statutory notices of deficiency will not be issued nor will any other action be taken with respect to the civil liability in cases in which a recommendation for criminal prosecution is likely or has been made, if such action would imperil successful criminal investigation or prosecution."
>
> (See Chapter 4500, P-4560-3, Approved 3/2/60.)

The Government has argued that evidence of this administrative policy is irrelevant in that it is simply a housekeeping provision of the Internal Revenue Service and was not intended to bestow any rights upon the defendant, constitutional or otherwise. *Sullivan v. United States*, 348 U.S. 170 (1954). At the hearing, we tentatively overruled the Government's objection as to the lack of relevancy of evidence pertaining to the administrative policy in question. At this point, suffice it to say that while we may ultimately agree with the Government's contention that the policy is

essentially a housekeeping provision, the Government's objection at the hearing as to the lack of relevancy of the administrative policy begs the question which we have been called upon ultimately to decide; i.e., whether the failure to extend the policy to the defendant is a denial of due process.

Although it is clear from the record that there is an administrative policy in the Internal Revenue Service and in the United States Department of Justice of not issuing statutory notices of deficiency requiring petitions and replies to be filed in the Tax Court in cases in which a recommendation for criminal prosecution is likely or has been made, it does not appear that the defendant has any standing, constitutional or otherwise, to object to a deviation from that policy. In order to maintain public respect for the tax laws and to deter others from similar violations, the Internal Revenue Service and the Department of Justice have adopted a policy whereby the imposition of criminal sanctions in the cases selected for prosecution should be considered paramount in relation to the civil aspects of the cases. The policy is not predicated on an administrative determination that to do otherwise would be to compel the defendant to be a witness against himself in violation of the Fifth Amendment. Rather, it is predicated on an administrative determination that to do otherwise would not be in the best interests of the Internal Revenue Service, the Department of Justice and the public at large. In electing to deviate from a policy which the record indicates was self-serving, the Government has not thereby deprived the defendant of any rights.

Moreover, not only is the policy for the benefit of the Government, but is admits of exceptions. It does not clearly appear from the record in what circumstances exceptions to the policy were made by the Government. Apparently, the defendant's position is that in excepting to the policy in this instance the Government deviated from the normal cir-

cumstances wherein an exception would be made. However, the defendant's contentions are lacking in merit in that we are unable to ascertain from the record those circumstances wherein exceptions to the policy were normally made and in that the policy excepted to was for the benefit of the Government.

Furthermore, even if we assume that the Government's failure to extend the administrative policy in question to the defendant was a denial of due process, it seems clear that the equal protection aspects of the due process clause of the Fifth Amendment may have been violated only insofar as the Government has been able to thereby obtain incriminating evidence. Proceeding on the assumption that the Government did acquire incriminating evidence in violation of the Fifth Amendment, the defendant would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. *United States v. Blue, supra.*

This is not a case where it affirmatively appears that there was no evidence of income tax evasion presented to the Grand Jury, or that all of the evidence which it heard on the inquiry was unlawfully procured, in violation of some fundamental right of the defendant, and which would be barred on the trial as incompetent and inadmissible against him. The defendant cites no case, nor have we been able to find one, in which it has been held that the mere introduction before the Grand Jury of incompetent evidence, whether constitutional rights are invaded or not, has been held ground for abating an indictment which has been returned upon such evidence, together with other competent evidence against the accused.

Accordingly, the defendant's motion to dismiss the indictment on the ground that the Government's refusal to extend to the defendant the administrative policy of making no assessments in advance of criminal proceedings was a denial of due process is denied.

ORDER.

AND NOW, this 2nd day of January, 1968, IT IS ORDERED that item two of defendant's motion for particulars is DENIED; that item three of defendant's motion for particulars is GRANTED; that all items of defendant's motion to suppress are DENIED; that defendant's motion to dismiss the indictment is DENIED.

E. MAC TROUTMAN, *J.*

APPENDIX B.

Memorandum Opinion and Order of District Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CRIMINAL No. 22706.

UNITED STATES OF AMERICA

v.

FRANK A. JASKIEWICZ

MEMORANDUM OPINION.

WEINER, *J.* November 26, 1968

This case is before us as the result of the defendant's motions for judgment of acquittal under rule 29(c) and a new trial.

The defendant, in four separate counts, was charged with attempting to evade a portion of his income tax for the years 1960 through 1963.[1] Upon the conclusion of a lengthy trial the jury returned a verdict of guilty as to count I which encompasses evasion for the year 1960 and a verdict of not guilty as to the remaining counts.

In light of the fact that some of the present contentions were previously decided, we shall place defendant's motions in two categories. The first group will consist of

1. "Any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof . . . shall be guilty of a felony . . ." 26 U. S. C. § 7201.

those which had been previously proffered and ruled upon. They consist of the defendant's challenge to the admission at trial of evidence which he contends was obtained through trickery, fraud, and deceit; institution of simultaneous criminal and civil proceedings; accountant-client privilege and mail cover. The second group embraces the following allegations; (a) The net worth computations of the Government are unreliable and insufficient to convict as a matter of law; (b) The verdict was contrary to the weight of the evidence and not supported by substantial evidence; (c) Prejudicial remarks made by government counsel in his argument to the jury; (d) Errors in the Court's charge.

GROUP ONE.

On January 2, 1968, our brother, Troutman, J. ruled and decided for reasons so well stated in his opinion that the defendant's allegation that the government obtained evidence through trickery, fraud and deceit had no validity. He further determined that due process was not denied the defendant as the result of simultaneous prosecution of civil and criminal tax actions and that there is no privilege with respect to communications made to an accountant by an employer for the purpose of preparing financial statements or doing other work characteristically performed by accountants.

With one exception, we had no hesitation in expressing our complete satisfaction and accord with the law as stated in Judge Troutman's able opinion. However, during the course of trial and in this motion the defendant vehemently protests the admission into evidence of information given by him to government tax agents which was used in this criminal prosecution. He argues that he is entitled to the same constitutional warnings that our courts have given to any other suspect being questioned where criminal prosecu-

tion is contemplated. The evidence indicates that at its inception this was an ordinary investigation of civil tax liability. During this phase of the investigation the defendant furnished information which caused it to be viewed as subjecting him to possible criminal prosecution. The defendant was again interviewed and was warned of his constitutional rights to remain silent and not to incriminate himself. He was not warned of his right to representation by counsel nor was he told that the investigation had changed to one with a view toward criminal prosecution. Placing his faith in the concept of law stated in *Escobedo v. State of Illinois,* 378 U. S. 478 (1964) and of *Miranda v. State of Arizona,* 384 U. S. 436 (1966) the defendant proclaims that the failure to give him any warning during the initial part of the investigation, the omission to inform him of the criminal character of the investigation and not telling him of his right to counsel, demanded the suppression of the evidence obtained while being interrogated by the tax agents.

I am both troubled and impressed by the rationale of the dissenting opinion of Justice Douglas expressed in Thomas v. United States, 386 U. S. 975 (1965), wherein he noted:[2]

> "I would grant this petition on the fourth question. It concerns the apparent practice of Internal Revenue agents in examining tax-payers and using the evidence obtained in criminal prosecutions when the tax-payers are given no warnings as to their rights, including the right to have an attorney present. This is not an in-custody case, but it is a coercive examination of a tax-payer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one," and the reasoning in *United States v. Turzynski,*

2. *Thomas* had appealed from a conviction of wilfully making false statements on his income tax returns. Certiorari was denied.

> 268 F. Supp. 847, 854 (N. D. Ill. 1967): "[T]hat a tax-payer being investigated for the purposes of criminal tax investigation is entitled to knowledge of that fact and of his constitutional rights and privilege just as any other suspect being interrogated in contemplation of his possible criminal prosecution; (2) that custody or lack thereof is not the sine qua non of whether or not constitutional rights have knowingly by and voluntarily been waived; (3) that an adequate constitutional admonition must be given by revenue agents when the investigation is converted from civil to criminal, customarily at such time as the case is transferred to the intelligence division; and (4) that any information or evidence obtained directly or indirectly solely from the tax-payer after this date in the absence of such a warning has not been disclosed pursuant to a knowing and voluntary waiver of his constitutional rights and privileges unless made in the presence of his counsel, and must therefore be suppressed".

Unquestionably, if the standards recited above were to be applied to the facts of this case the motion to suppress the evidence would be granted.

In addition, we wish to emphatically express our approval of that principle of law enunciated in *Prack v. Weissinger*, 276 F. 2d 446, 450 (4th Cir. 1960) wherein it was stated:

> ". . . In federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other" citing *United States v. County of Lawrence*, 164 F. Supp. 542, 543 (W. D. Pa. 1958).

and it is only in exceptional circumstances (which do not exist in the present case), that the trial judge should over-

rule a judge of coordinate jurisdiction, *United v. Koenig*, 290 F. 2d 166 (5th Cir. 1961). It is the rule of the Third Circuit Court that judges of co-ordinate jurisdiction sitting in the same court should not overrule the decisions of each other. *TCF Films Corp. v. Gourley*, 240 F. 2d 711, 713 (3d Cir. 1957).

However, the massive weight of authority is adverse to the legal conclusions cited above. As related in *Frohmann v. United States*, 380 F. 2d 832 (8th Cir. 1967):

> "Whenever the question has been presented to a court of appeals, the court has refused to extend the Escobedo and Miranda requirement for the rendition of advice as to the right to counsel to the situation of a pre-custody internal revenue service inquiry. *Morgan v. United States*, 377 F. 2d 507 (1st Cir. 1967); *Schlinsky v. United States*, 379 F. 2d 735 (1st Cir. 1967); *Mathis v. United States*, 376 F. 2d 595 (5th Cir. 1967); *United States v. Maius*, 378 F. 2d 716 (6th Cir. 1967); *Kohatsu v. United States*, 351 F. 2d 898 (9th Cir. 1965), cert. den. 384 U. S. 1011, 86 S. Ct. 1915, 16 L. Ed. 2d 1017; *Rickey v. United States*, 360 F. 2d 32 (9th Cir. 1966), cert. den. 385 U. S. 835, 87 S. Ct. 80, 17 L. Ed. 2nd 69; *Selinger v. Bigler*, 377 F. 2d 542 (9th Cir. 1967), cert. applied for June 30, 1967. See *United States v. Spomar*, 339 F. 2d 941 (7th Cir. 1964), cert. den. 380 U. S. 975, 85 S. Ct. 1336, 14 L. Ed. 2d 270. The great majority of unappealed district court cases in which the question has arisen are to the same effect. *Bohrod v. United States*, 248 F. Supp. 559, 564-566 (W. D. Wis. 1965); *Smith v. United States*, 250 F. Supp. 803 (D. N. J. 1966); *United States v. Fiore*, 258 F. Supp. 435 (W. D. Pa. 1966); *United States v. Hill*, 260 F. Supp. 139 (S. D. Cal. 1966); *United States v. Carlson*, 260 F. Supp. 423 (E. D. N. Y. 1966); *United States v. Spinney*, 264 F.

Supp. 774 (D. Mass. 1966); *Stern v. Robinson,* 262 F. Supp. 13 (W. D. Tenn. 1966); *United States v. Gleason,* 265 F. Supp. 880, 883 (S. D. N. Y. 1967); *United States v. Neves,* 269 F. Supp. 158 (S. D. N. Y. 1967); *United States v. Rabin,* 271 F. Supp. 190 (S. D. N Y. 1967).

Weighing carefully the previous opnions filed by our brother jurist, the impressive list of cases deciding that in a pre-custody internal revenue service inquiry there is no requirement to provide constitutional warnings to the subject under investigation, it is our opinion that under the present state of the law the defendant's contentions cannot be sustained.

Our next inquiry is to determine if the remaining reasons are sufficient to require a new trial or a judgment of acquittal. In that each of the several reasons assigned in support of his motions involve different factual and/or legal issues, they will be discussed seriatum.

NET WORTH CONTROVERSY.

We will approach the solution to this perplexing problem by keeping in mind the admonition of our Supreme Court as expressed in *Holland v. United States,* 348 U. S. 212 (1954). The guidelines provided therein require us to probe and then to conclude whether the government has provided sufficient evidence to convict and has effectively negated reasonable explanations by the taxpayer of net worth increase which are inconsistent with guilt. Our review of the testimony compels an adjudication that the government has more than met its burden in this respect. True, the defendant has offered a theory compatible with innocence. Also true is the fact that the government did provide the jury with credible evidence from which it could arrive at a belief that the validity of the defendant's position was vulnerable. We cannot as a matter of law hold that the evi-

dence submitted by the government was so deficient as to enable us to take this question away from the jury. To the contrary, it is our conviction that this was a classic jury problem.

The defendant alleges that the net worth computation of the government was unreliable and insufficient as a matter of law. Our consideration of the evidence leads us to a contrary conclusion. From their starting point in December of 1956 through the indictment years the government submitted evidence of a substantial increase in net worth from which the jury could properly infer an evasion of the payment of income tax.

The attack upon the failure of the government to track down relevant leads furnished by the taxpayer is without substance. The witnesses for the government reasonably explained their activities in regard to information furnished to them by the defendant. The leads that were susceptible of investigation were pursued. We conclude that the government introduced relevant testimony to support an inference that the net worth increase was attributable to taxable income; sustained its obligation to establish the likely source of defendant's income which were susceptible of being checked out. Neither *Holland v. United States, supra* or *Friedberg v. United States,* 348 U. S. 142 (1954) impose a greater obligation.

SUMMATION OF PROSECUTOR.

It is a general proposition of law that when confined to the evidence or reasonable inferences, the arguments of counsel are not to be too narrowly limited. *Wakaksan v. United States,* 367 F. 2d 639, cert. denied 386 U. S. 994 (1966). [T]he trial court has wide discretion in its control of extent of summation by counsel but such discretion is not unlimited. *United States v. Schwartz,* 325 F. 2d 355 (3d Cir. 1963).

Defendant insists that the United States Attorney resorted to passion and prejudice to obtain a conviction. Specifically, it is said that the following utterance by the prosecutor was highly inflammable and grossly unfair:[3]

"Now, there was a mail cover in this case. Dirty, dirty work, mail cover. It is an investigative tool that if it were not used in appropriate cases the investigator would not be performing his duty. Every means, every legal means that an investigator has, has to be used in order to protect society, and that was true on November 22 of 1963, the crime that was committed in Dallas, and it was true on April 4th of this year, the crime that was committed in Memphis, and it was—

MR. SARNER: If Your Honor please, I think——

MR. REITER: It was true——

MR. SARNER: If Your Honor please, I object. You can't have the prosecutor talk about the murder of the president or the murder of Rev. Martin Luther King.

MR. REITER: I am talking about investigative techniques.

MR. SARNER: No. Your Honor, I think that is inflammatory matter. I think Your Honor should so inform the jury.

THE COURT: Mr. Reiter, I think the analogy might be prejudicial to use it in this case.

MR. REITER: I will strike the analogy. The point that I am trying to make there is that there is a duty on law-enforcement to catch criminals, and as long as

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3. Notes of Testimony, May 16, 1968, pages 38-39-40.

the means are legal they have got to be used. Now, you just can't make a mail cover a dirty thing, when you are investigating a crime. It is a crime that is the dirty thing. The crime, not the mail cover. And, incidently, what is a mail cover? It is just getting the names and addresses off of the envelopes. The mail is not opened. The first-class mail is circulated. No one opens it. All that is gotten is who was writing to the defendant and who the defendant was writing to. That is the mail cover. It is not unfair unless it is unfair to attempt to stamp out the crime".

The remarks of government counsel may have been unfortunate and ill-advised but I am sure that the ideas which they suggested do not rise to the inflammatory concept that would be equivalent to substantial prejudice resulting in an unfair trial. The mail cover controversy was an issue and arguments for and against same were offered to the jury by opposing counsel.

If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 243 (1940). Coupling the withdrawal of the alleged inflammatory statement by the prosecutor with the trial judge's admonition to the jury we regard any flame of prejudice to have been effectively extinguished. It is our conclusion that prejudicial error was not committed by counsel for the government.

ALLEGED ERROR IN COURT'S CHARGE.

One of the grounds asserted in defendant's motion for a new trial is the claim that the Court erred in charging the jury as to the law concerning prior and post offense admissions.

The Government introduced both prior and past offense admissions made by the defendant to its agent.[4] Its purpose was to establish the veracity of a portion of the calculated source of defendant's income. The admission of this evidence required proper instruction to the jury. This we did and we are unable to find error in our charge.[5]

During the course of its deliberations the jury requested an answer to the following question:[6]

"Point of law—is it possible to *deduct* a gift of $15,000.00 given to your son to purchase a liquor license". This request was called to the attention of all parties and thereafter the answer forwarded to the jury stated "A gift as a gift to a son is not deductible".[7] The defendant complains that our answer was non-responsive and prejudicially confusing. We find no merit to this argument. It will serve no useful purpose to belabor this point as a carual perusal of the question and answer thereto should be sufficient to establish that our instruction completely covered the issue involved. The principle of law denying to a taxpayer the privilege of deducting gifts made to a son is well established and does not merit further discussion.

The Court having heard the oral arguments of counsel for the government and of counsel for the defendant and having carefully examined the evidence, the briefs submitted by counsel and having studied the authorities relied upon by respective counsel can find no persuading reason to negate the jury's verdict.

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4. Notes of Testimony, 3446-49.
5. Page 53 of Court's charge.
6. Notes of Testimony, May 17, 1968, at 3.
7. Notes of Testimony, May 17, 1968, at 24.

ORDER.

The motions of the defendant for a judgment of acquittal and a new trial are DENIED.

IT IS SO ORDERED.

CHARLES R. WEINER, J.

APPENDIX C.

Opinion and Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 18387

UNITED STATES OF AMERICA

v.

FRANK A. JASKIEWICZ,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued June 22, 1970

Before WINTER,* ALDISERT and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT.

(Filed September 28, 1970)

GIBBONS, *Circuit Judge.*

This is an appeal from a sentence following a jury verdict of guilty on one count of a four count indictment

* Circuit Judge of the Court of Appeals for the Fourth Circuit, sitting by designation.

charging appellant with attempting to evade a portion of his income tax for the years 1960 through 1963. Appellant was found guilty with respect to the year 1960 and not guilty with respect to each of the other years. He contends that his conviction should be set aside for two reasons:

(1) After his tax returns were assigned to a Special Agent of the Intelligence Division, the Internal Revenue Service was obliged to give him a full *Miranda* warning before obtaining any information from him. The warning actually given was incomplete in that it failed to advise him of his right to have counsel present at any interrogation.

(2) The evidence used against him was unconstitutionally obtained by misrepresentation, fraud and deceit as to the criminal nature of the tax investigation even before the assignment of the case to the Intelligence Division.

Appellant, apparently because he was known as a professional gambling operator, was from February 18, 1961 to March 12, 1963, subjected to a Post Office Department Mail Cover. In 1962 he and others similarly situated were subject to a tax examination. The first step in that examination was a reference, in December, 1962, of his returns for the years 1957, 1958 and 1959 to Revenue Agent Daniels of the Audit Division. The assignment was accompanied by no special instructions and was made routinely through the usual audit channels. Because Daniels had returns of other taxpayers assigned to him, he did not begin his audit of appellant's returns until March of 1963. On March 26, 1963, Daniels first met with appellant at his place of business. Appellant answered some questions, declined to answer others, and directed Daniels to Allen Speiser, his accountant, for certain information. On April 16, 1963, Daniels again called on appellant, who again answered some questions, declined to answer others, and re-

ferred the Revenue Agent to his accountant. In July of 1963, and 1960 tax return was also assigned to Daniels.

On April 14, 1964, the Revenue Agent, having observed unexplained bulges of net worth, referred appellant's returns to the Intelligence Division for investigation. Under standard Internal Revenue Service procedures, when in the course of a civil examination a Revenue Agent assigned to the Audit Division suspects a potential criminal violation, that Division is required to refer the file or case to the Intelligence Division, the criminal investigating arm of the Service.

The Intelligence Division assigned appellant's file to Special Agent Maser, who reviewed the facts and determined that they warranted further investigation. Maser's first step in that investigation, on August 13, 1964, was to call on Allen Speiser, appellant's accountant, who had prepared and signed a number of the tax returns. Maser identified himself to Speiser as a Special Agent and advised that he was there to determine whether there was a fraudulent understatement of income.

Speiser arranged for a meeting between Maser and Daniels, and the appellant, at appellant's office on June 11, 1964. Maser and Daniels attended. Maser advised appellant that under the Constitution he was not required to make any statements or furnish any information which might incriminate him under any federal law. Appellant responded that he understood these rights and that he had nothing to hide. He was asked to give a statement under oath and declined.

Prior to June 11, 1964 Revenue Agent Daniels had not given appellant any Fifth Amendment warning. Daniels had not, however, questioned appellant between April 14, 1964, when he referred the case to the Intelligence Division, and June 11, 1964.

Neither on June 11, 1964, nor at any time thereafter, did either Agent advise appellant of his right to have counsel present. Appellant was, however, on June 11, 1964 and at all times pertinent to the investigation, represented by retained attorneys. At a subsequent meeting on January 8, 1965, he referred the agents to those attorneys for certain information. At another meeting on March 1, 1965, when the agents requested the execution of consent forms for an extension of the statute of limitations (Form 872), appellant telephoned his attorneys and arranged to meet with them to discuss execution of these forms. On March 12, 1965, he again referred the agents to his attorneys for certain information. The agents never spoke to the attorneys to whom they had been referred because those attorneys never filed with the Internal Revenue Service the required powers of attorney.

All meetings between appellant and the Revenue and Special Agents took place during normal working hours, at the appellant's own telephone-equipped office, with other friendly persons, including appellant's son-in-law, on the premises on each occasion. Neither agent carried firearms or handcuffs during the interview, and according to the testimony of Maser, questions were put to appellant in a gentlemanly and conversational tone, more moderate than that of defense counsel in his cross-examination.

There is no contention that appellant's statements to either agent were in fact involuntary. Rather, it is contended that evidence obtained as a result of interrogation of appellant after the case was referred to the Intelligence Division was inadmissible, since the warning given by Agent Maser did not fully comply with the *Miranda* formula. 385 U. S. 436, 478-79 (1966). The argument is that *Miranda* applies once the defendant has become the focus of a criminal investigation, and that this occurred when on

April 14, 1964 the case was transferred to the Intelligence Division.

The indictment was handed up in this case on November 22, 1966, five months after the *Miranda* decision. The trial took place beginning on March 25, 1967. Thus, if questioning by the Special Agent falls within *Miranda* the exclusionary rule of evidence probably would apply even though the interrogations took place prior to the *Miranda* decision, see *Johnson v. New Jersey*, 384 U. S. 719, 721 (1966); although an argument could be made that administrative practices followed, as here, in reliance on prior law justified admission of the evidence as a matter of judicial discretion. See, e.g., *Jenkins v. Delaware*, 395 U. S. 213, 218 (1969); *Desist v. United States*, 394 U. S. 244 (1969); *Stovall v. Denno*, 388 U. S. 293 (1967); *United States v. Dickerson*, 413 F. 2d 1111, 1117 (7 Cir. 1969). We do not reach that issue, however, for we hold that in the circumstances of this case *Miranda* did not mandate exclusion of the evidence to which appellant objects.

Appellant relies on the decision of the Seventh Circuit in *United States v. Dickerson*, *supra*, in support of his contention that once the Intelligence Division is in the picture a taxpayer must be given full *Miranda* warnings. That case so holds, but every other circuit to which the contention has been made, including the First,[1] the Second,[2] the

1. *Taglianette v. United States*, 398 F. 2d 558, 561 (1 Cir. 1968), *aff'd*, 394 U. S. 316 (1969); *Spinney v. United States*, 385 F. 2d 908, 910 (1 Cir. 1967), *cert. denied*, 390 U. S. 921 (1968); *Schlinsky v. United States*, 379 F. 2d 735, 738 (1 Cir.), *cert. denied*, 389 U. S. 920 (1967); *Morgan v. United States*, 377 F. 2d 507, 508 (1 Cir. 1967).

2. *United States v. White*, 417 F. 2d 89, 91 (2 Cir. 1969), *cert. denied*, 397 U. S. 912 (1970); *United States v. Marcus*, 401 F. 2d 563, 566 (2 Cir. 1968), *cert. denied*, 393 U. S. 1023 (1969); *United States v. Mackiewicz*, 401 F. 2d 219, 223 (2 Cir.), *cert. denied*, 393 U. S. 923 (1968); *United States v. Dawson*, 400 F. 2d 194, 206 (2 Cir. 1968), *cert. denied*, 393 U. S. 1023 (1969); *United States v. Squeri*, 398 F. 2d 785, 788-90 (2 Cir. 1968).

Fourth,[3] the Fifth,[4] the Sixth,[5] the Eighth,[6] the Ninth [7] and the Tenth,[8] it has been rejected. This court has not previously considered the matter.[9]

Each of those circuits which have rejected appellant's contention have held that the crucial element for the application of the exclusionary rule of evidence announced in *Miranda* is the restraint on freedom of action arising from custody. The Seventh Circuit rejects the restraint on freedom of action test. It reasons:

> We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to

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3. *United States* v. *Bagdasian*, 398 F. 2d 971, 973 (4 Cir. 1968); *United States* v. *Mancuso*, 378 F. 2d 612, 619, *modified on other grounds*, 387 F. 2d 376 (4 Cir. 1967), *cert. denied*, 390 U. S. 955 (1968).

4. *United States* v. *Jernigan*, 411 F. 2d 471, 472 (5 Cir.), *cert. denied*, 396 U. S. 927 (1969); *Agoranos* v. *United States*, 409 F. 2d 833, 835 (5 Cir.), *cert. denied*, 396 U. S. 824 (1969); *Thomas* v. *United States*, 370 F. 2d 96 (5 Cir. 1966), *cert. denied*, 386 U. S. 975 (1967).

5. *United States* v. *Mains*, 378 F. 2d 716, 718-19 (6 Cir.), *cert. denied*, 389 U. S. 905 (1967).

6. *Muse* v. *United States*, 405 F. 2d 40, 41 (8 Cir. 1968), *cert. denied*, 393 U. S. 1117 (1969); *Cohen* v. *United States*, 405 F. 2d 34, 40 (8 Cir. 1968), *cert. denied*, 394 U. S. 943 (1969); *Frohmann* v. *United States*, 380 F. 2d 832, 835-36 (8 Cir.), *cert. denied*, 389 U. S. 976 (1967).

7. *United States* v. *Chikata*, 427 F. 2d 385 (9 Cir. 1970); *Spahr* v. *United States*, 409 F. 2d 1303, 1304-05 (9 Cir.), *cert. denied*, 396 U. S. 840 (1969); *Feichtmeir* v. *United States*, 389 F. 2d 498, 504 (9 Cir. 1968); *Selinger* v. *Bigler*, 377 F. 2d 542 (9 Cir.), *cert. denied*, 389 U. S. 904 (1967); *Rickey* v. *United States*, 360 F. 2d 32, 33 (9 Cir.), *cert. denied*, 385 U. S. 835 (1966); *Kohatsu* v. *United States*, 351 F. 2d 898, 902 (9 Cir. 1965), *cert. denied*, 384 U. S. 1011 (1966).

8. *Hensley* v. *United States*, 406 F. 2d 481, 484-85 (10 Cir. 1969).

9. The United States District Court for the Middle District of Pennsylvania adopted the focus test rather than the custody test in *United States* v. *Gower*, 271 F. Supp. 655, 660 (M. D. Pa. 1967). That case did not reach this court.

> make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence.

United States v. Dickerson, *supra* at 1114.

This reasoning does not persuade us. The issue is not whether or not the Fifth Amendment applies in a non-custodial setting. It is whether or not the affirmative duties imposed upon governmental agencies by *Miranda* arise by virtue of the defendant's being a potential target of an indictment, or arise by virtue of the fact that a governmental agency has in some meaningful way subjected him to physical, or perhaps psychological, restraint. We are persuaded that those duties arise not because the defendant has become the focus of a potential indictment but because the government has in some meaningful way imposed restraint on his freedom of action. Our holding in *United States v. Fioravanti*, 412 F. 2d 407, 413 (3 Cir.), *cert. denied*, 396 U. S. 837 (1969), that statements made while in custody to persons connected with the government do not fall within *Miranda*, implies as much. *Miranda* deals with governmental conduct toward persons whom the government has subjected to restraint.

In *Mathis v. United States*, 391 U. S. 1 (1968), the Supreme Court applied *Miranda* to exclude evidence in a criminal tax fraud trial of statements obtained by an Audit

Division Revenue Agent from the defendant at a time when he was in the custody of the State of Florida on an unrelated charge. The Court rejected the Government's contention that because the tax investigation had not yet changed from civil to criminal *Miranda* did not apply. Its opinion reiterated that it was the possible compulsion arising from custody—any custody—which was the policy basis of *Miranda*. The absence of a criminal focus was irrelevant.

In *Orozco v. Texas*, 394 U. S. 324 (1969), again, the Court emphasized that custody was the key. In that case the interrogation took place in the defendant's bedroom at 4 a.m. by officers who had arrested him there. Justice Black for the Court wrote of *Miranda*:

> But the opinion iterated and reiterated the absolute necessity for officers interrogating people "in custody" to give the described warnings.

Orozco v. Texas, *supra* at 326.

Miranda has in *Mathis* and *Orozco* been made applicable to custodial situations outside the police station. But the rule still deals with the government's duty in a custodial situation, and imposes an obligation on the courts to enforce that duty by an exclusionary rule of evidence.

This is not to say that forms of compulsion other than custody, or absent custody, are irrelevant for Fifth Amendment purposes. Clearly they are relevant, and some of such non-custodial forms of compulsion to waive the privilege against self-incrimination are of constitutional dimensions. See, e.g., *Gardner v. Broderick*, 392 U. S. 273 (1968); *Spevack v. Klein*, 385 U. S. 511 (1967); *Garrity v. New Jersey*, 385 U. S. 493 (1967), and *Counselman v. Hitchcock*, 142 U. S. 547 (1892). Undoubtedly there is some degree of compulsion upon a taxpayer to cooperate with the Internal Revenue Service merely from the fact that civil remedies

exist for the enforcement and collection of taxes. Undoubtedly that psychological compulsion increases somewhat when a taxpayer is made aware of possible criminal sanctions. But the compulsion to attempt to avoid criminal sanctions by testimony is not such as to violate the Fifth Amendment, *Williams v. Florida*, 38 U. S. L. W. 4557, 4559-60 (U. S. June 22, 1970); and in any event the standards for weighing such non-custodial compulsions are not those of *Miranda*. Rather, they are those discussed in *United States v. Kordel*, 397 U. S. 1 (1970), and *DeVita v. Sills*, 422 F. 2d 1172 (3 Cir. 1970). Appellant here was subjected to the psychological pressure resulting from dealing with the Revenue and Special Agents, and elected to cooperate. Kordel's co-defendant was subjected to the psychological pressure resulting from a civil lawsuit brought by the Food and Drug Administration, and elected to answer interrogatories. Just as the Food and Drug Administration was not required to serve a *Miranda* warning with the interrogatories, the agents were not required to give such a warning here, so long as appellant remained free of any form of restraint upon his freedom of action. Cases may arise in which, in a tax collection context, the penalties for asserting the privilege against self-incrimination become so great that the teaching of *Gardner v. Broderick, supra, Spevack v. Klein, supra,* and *Garrity v. New Jersey, supra,* should be applied. This is not such a case. Cases may arise in which the conduct of the government agents is such as to amount to the equivalent of custodial compulsion, as in *Orozco v. Texas, supra.* This is not such a case. Cases may arise in which the pressures exerted or promises made by Revenue Agents or Special Agents may make the statements of the defendant taxpayer actually involuntary. This is not such a case.

In short, the decision in *Miranda v. Arizona*, 384 U. S. 436 (1966), does not require that this court in this case depart from its pre-*Miranda* rule that the sole test for admis-

sibility of a taxpayer's statements to agents of the Treasury Department is the voluntariness of the statements. *United States v. Frank*, 245 F. 2d 284 (3 Cir.), *cert. denied*, 355 U. S. 819 (1957); *United States v. Burdick*, 814 F. 2d 768, 773 (3 Cir. 1954), *cert. denied*, 350 U. S. 831 (1955).[10]

In support of his second contention, that the agents obtained evidence by misrepresenting the nature of the tax investigation as civil rather than criminal, appellant relies on three factors. First, he was subjected to a Post Office Department Mail Cover from February 18, 1961 to March 12, 1963. Second, Revenue Agent Daniels' office was located in close physical proximity to the offices of the Intelligence Division. Third, agent Daniels' audits were part of an "organized crime drive". These factors were advanced unsuccessfully to the district court in a pre-trial motion for suppression of evidence, and again to the district court at the trial. They were also submitted to the jury with the charge:

> ". . . Any information, papers, business books, records, documents or oral or written admissions which you find were obtained from the defendant or his accountant by Government agents by any fraud, force, persuasion, misrepresentation, trickery, or deceit, should not be considered by you against the defendant. It is for you to determine whether or not information or leads were

10. In News Release IR-949 dated November 26, 1968 the Service announced a revised procedure for advising a taxpayer of his rights during an investigation conducted by a Special Agent of the Internal Revenue Service, Intelligence Division. A Special Agent is now required to identify himself, describe his function, advise the taxpayer that anything he says may be used against him, advise the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and advise the taxpayer that he has the right to seek the assistance of an attorney before responding. See *Cohen v. United States*, 405 F. 2d 34, 39 (8 Cir. 1968). We do not here decide the effect, in a post-November 26, 1968 situation, of the failure of a Special Agent to follow the newly prescribed practice.

obtained in this manner—that is for you, ladies and gentlemen—just as you must determine the reliability of the Government's computations to your satisfaction beyond a reasonable doubt.

The issue of fraud and deceit is relevant only with respect to the period prior to participation by the Intelligence Division, since at the first meeting with appellant's representative, Speiser, the Special Agent disclosed a possible tax fraud charge. A mail cover was authorized by postal regulations then in force for both civil and criminal purposes.[11] Both agents testified they obtained no useful information from the mail cover. Agent Daniels testified his initial investigation was routinely civil, that his duties were entirely civil, and that the location of his office was a mere housekeeping matter for the Service. Moreover, Daniels never suggested that there would be no criminal charge, and he was dealing with a sophisticated, represented taxpayer. There was no affirmative duty on the part of the Government to disclose to appellant the extent and nature of its investigation. *Hoffa v. United States*, 385 U. S. 293, 303 (1966); *Lewis v. United States*, 385 U. S. 206, 209 (1966). The jury in arriving at its general verdict determined the issue of fraud and deceit of the Revenue Agent adversely to the appellant, and where the record supports such determination we cannot go behind that verdict. *Smith v. United States*, 348 U. S. 147, 151 (1954).

The judgment of the district court will be affirmed.

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11. A mail cover is the process by which a record is made of any data appearing on the outside envelope or wrapper of mail addressed to a person under such surveillance. The availability of this device has since been reduced. Postal Bulletin of June 17, 1965 re: Postal Manual, Subchapter 860, Part 861.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18387

UNITED STATES OF AMERICA

v.

FRANK A. JASKIEWICZ,
Appellant

(D. C. CRIMINAL No. 22706)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WINTER*, ALDISERT and GIBBONS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 12, 1969, be, and the same is hereby affirmed.

ATTEST:
THOMAS F. QUINN,
Clerk.

September 28, 1970

*** Circuit Judge of the Court Appeals for the Fourth Circuit, sitting by designation.**

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 884

FRANK A. JASKIEWICZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of income tax evasion, in violation of Section 7201 of the Internal Revenue Code. He was sentenced to the custody of the Attorney General for a period of six months and fined $5,000. The court of appeals affirmed (Pet. App. C).

A civil audit of petitioner's tax returns, which commenced in 1963, revealed unexplained increases in net worth for the calendar years 1960 to 1963, inclusive. The case was referred to the Intelligence Division for a fraud investigation. The special agent assigned the matter first contacted petitioner's accountant who had prepared the returns, informing

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him of the criminal potential of the case. The accountant then arranged a meeting with petitioner, at which the revenue agent and the special agent introduced themselves and warned petitioner of his right to remain silent; however, no warning as to petitioner's right to counsel was given at this or any other time[1] (App. 73a, 350a, 351a, 529a–536a).[2]

After investigation, the matter was referred to a grand jury. Interrogation of petitioner's accountant revealed that petitioner had withheld from him information of tax consequence. An indictment was returned and the conviction followed.

1. Petitioner contends that evidence obtained during a civil tax audit was improperly admitted against him in the instant criminal proceedings since it was procured during "a search for criminal purposes conducted under the guise of an examination for purely civil purposes" (Pet. 9). However, the facts do not support this contention. At the outset, the tax examination was handled by a revenue agent of the Audit Division in the routine manner (Pet. App. C 37b).[3] Upon discovery of unexplained bulges in net worth, the case was referred to the Intelligence Division, at which point petitioner and his accountant were

[1] At all times relevant to the investigation, petitioner had retained counsel with whom he consulted at least one time during the investigation, App. 358a, 574a and 575a).

[2] "App." references are to the separate Appendix to the Briefs in the Court below.

[3] The revenue agent along with others in his audit group were quartered in the same area as members of the Intelligence Division. This was a mere housekeeping matter and changed neither his duties nor his approach to his duties (App. 45a, 198a–200a).

made aware of its criminal potential' (App. 73a, 350a, 351a, 529a–536a). In these circumstances, the Treasury agents went beyond what is required by law, for all that is necessary is that the taxpayer be advised that the examining agents are concerned with the accuracy of his returns. See *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Prudden* v. *United States* 424 F. 2d 1021, 1031–1035, C.A. 5), certiorari denied, October 12, 1970, No. 453, this Term; *United States* v. *Frank*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zacher* v. *United States*, 277 F. 2d 213, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993. Inherent in that advice is the warning that the agents will pursue evidence of misreporting without regard to the shadowy line be-

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'The suggestion in the petition that a mail cover on the petitioner had been established in February 1961 at the request of the Intelligence Division (Pet. 4) is inaccurate. While there was a mail cover in effect as petitioner indicates, this was clearly due to a request by the postal inspector (App. 16a), not the Intelligence Division. Moreover, petitioner is in error when he claims that the mail cover could not be obtained for civil purposes prior to 1965. Section 331.6 of the manual in use during the period February 18, 1961–March 12, 1963, the dates of the instant mail cover, permitted a postal inspector to take such action without reference to civil or criminal matters. In addition, the postal inspector could disseminate information obtained as a result of the mail cover to others without restriction. *United States* v. *Schwartz*, 283 F. 2d 107 (C.A. 3).

The revenue agent who conducted the civil tax audit in the instant case made no use of the mail cover, nor has petitioner attempted to argue otherwise.

tween avoidance and evasion. *United States* v. *Sclafani, supra*, 265 F. 2d at 414–415; *Prudden* v. *United States, supra.*

Petitioner's reliance on *United States* v. *Kordel*, 397 U.S. 1, is misplaced. Indeed, there the Court held that use in a subsequent criminal prosecution of information garnered from a defendant in the ordinary course of a civil proceeding does not by itself violate any constitutional safeguard. The question whether the constitution requires disclosure to the defendant in a civil proceeding that a criminal prosecution is contemplated was not reached in that case (397 U.S. at 12). Nor was it considered in *Smith* v. *Katzenbach*, 351 F. 2d 810, 814 (C.A.D.C.), also cited by petitioner. However, the Second Circuit, in *United States* v. *Sclafani, supra*, met the issue squarely and held, on substantially identical facts, that "failure to disclose the changing course of the investigation is not fraudulent or deceitful" (265 F. 2d at 414).[5] Here, the evidence of disclosure is far stronger than it was in *Sclafani*,[6] and thus there is no warrant for further review.

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[5] The Court in *Sclafani* (265 F. 2d at 414–415) made explicit reference to *United States* v. *Lipschitz*, 117 F. Supp. 466 (E.D.N.Y.), on which petitioner places heavy reliance here, as being of questionable authority. With regard to the other decision relied upon by petitioner, *United States* v. *Guerrina*, 112 F. Supp. 126, 128 (E.D. Pa.), so much of the suppression order as there was based upon a failure to inform the taxpayer of his constitutional rights was subsequently vacated by the same judge in *United States* v. *Guerrina*, 126 F. Supp. 609, 610.

[6] In that case, apparently the only disclosure was through the introduction to petitioner of a Mr. Silbert as "special agent," which, it was there argued, apprised the petitioner that Silbert was connected with the Intelligence Division.

2. Petitioner attacks the court of appeals' holding that he was not entitled to *Miranda* warnings at the time the special agent entered the investigation because he was neither in custody nor otherwise deprived of his freedom in any significant way. However, this determination is in accord with the rule in every circuit except the Seventh. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Squeri*, 398 F. 2d 785, 788–790 (C.A. 2); *United States V. Caiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Mancuso*, 378 F. 2d 612, 618 (C.A. 4), certiorari denied, 390 U.S. 955; *Prudden* v. *United States*, *supra*; *Agoranos* v. *United States*, 409 F. 2d 833, 835, certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9), *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

In the only contrary holding, *United States* v. *Dickerson*, 413 F. 2d 1111, 1117 (C.A. 7), the court upheld a suppression order on the ground that a taxpayer must be given *Miranda* warnings "at the inception of the first contact with the taxpayer after the case had been transferred to the Intelligence Division"; but the holding was expressly limited only to "interrogations taking place after [July 28, 1969] the

date of this decision" 413 F. 2d at 1117. Thus, even if the *Dickerson* rule were applied to the case at bar, the evidence should not be suppressed since it was obtained in 1963 and 1964.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[7] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Gallagher*, C.A. 7, No. 18000, and *United States* v. *Townsend*, C.A. 7, No. 18159, both decided July 9, 1970.[8] The conflict, therefore, does not warrant further review by this Court.

For the reasons stated, the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

November 1970.

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[7] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55476.

[8] A petition for certiorari is pending in *Townsend*, No. 708, this Term.

U.S. GOVERNMENT PRINTING OFFICE: 1970

